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In The
Supreme Court of the United States

October Term, 1938.

No. 418

A. B. HALE, as Chairman and E. A. McCOLSKEY et al., etc., Appellants,

vs.

BIMCO TRADING, Inc., and BROWARD COUNTY PORT AUTHORITY, Appellees.

Appeal from the United States District Court of the Northern District of Florida

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BRIEF ON BEHALF OF APPELLANTS

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In the Supreme Court of the United States

October Term 1938, No. 418

A. B. HALE, as Chairman and
E. A. McCOLSKEY, et al as and constituting the
STATE ROAD DEPARTMENT OF
THE STATE OF FLORIDA,

Appellants,

vs.

BIMCO TRADING, INC., et al,

Appellees.

REFERENCE TO OFFICIAL REPORT OF THE OPINION OF THE LOWER COURT

No opinion was delivered by the lower court in this case. However, the statute involved in this proceeding was passed upon by the Supreme Court of the State of Florida in the case of State ex rel. Florida Portland Cement Company vs. Hale et al 129 Florida 588, 176 Southern 577.

STATEMENT OF THE CASE

This is an appeal from a final decree entered in the United States District Court in and for the Northern District of Florida by a three judge Federal Court convoked under Section 266 of the Judicial Code (Title 28, Section 380, U.S.C.A.) whereby the Appellants, as and constituting the State Road Department of the State of Florida, were enjoined and restrained from enforcing or attempting to enforce the provisions of a state statute of Florida known as Senate Bill No. 760 of the Legislature of Florida of 1937 (R. 66).

The Bill of Complaint was filed in this case on November 4th, 1937 in the United States District Court in and for the Northern District of Florida (R. 1) and came on for hearing before said court on application for a temporary restraining order on the 9th day of November, 1937, and the court denied the application for a temporary restraining order (R. 38). On the same date the District Judge entered an order convoking a three judge Federal Court under Section 266 of the Judicial Code (Title 28, Section 380 U.S.C.A.) for the hearing and determination of the application for interlocutory injunction applied for in said cause to be held on the 26th day of November, 1937 (R. 38). On November 24, 1937 the Appellants filed their motion to dismiss the Bill of Complaint (R. 40). On November 26, 1937 the Appellee, Broward County Port Authority, was granted leave to intervene in said suit as a party Plaintiff. On November 27, 1937 a hearing was had before the court convoked under Section 266 of the Judicial Code upon application for an interlocutory injunction, the Bill of Complaint, Affidavits in support thereof and the affidavit and exhibits filed by Appellants. The court granted the interlocutory injunction enjoining and restraining Appellants from enforcing the terms and provisions of said Senate Bill 760, Laws of Florida of 1937 (R. 54), but did not take up for hearing or pass upon the motion to dismiss the Bill of Complaint which was then pending in said cause. On December 3rd, 1937 the court issued interlocutory injunction enjoining and restraining the Appellants from enforcing or attempting to enforce the inspection provisions of the Act of the Legislature of Florida known as Senate Bill No. 760 of the year A.D. 1937 (R. 63) (See copy of Act attached hereto as Appendix A). No opinion was filed in connection with entry of the interlocutory injunction. On January

6, 1938, an amendment was filed to the Bill of Complaint which was consented to by Appellants (R. 65). On March 3, 1938 the court, after hearing arguments, entered its order overruling and denying the motion to dismiss the Bill of Complaint (R. 65). On June 14, 1938, the court on motion entered default or decree pro confesso against Appellants and entered its final decree granting a permanent injunction and restraining the Appellants from enforcing or attempting to enforce the inspection provisions of said Act of the Legislature of the State of Florida passed in 1937 and known as Senate Bill No. 760, which permanent injunction followed the terms of the interlocutory injunction (R. 66). The court filed no opinion in connection with the entry of the final decree.

The pleadings and exhibits filed in this cause show the following facts:

The Appellee, Bimco Trading, Inc., is a corporation organized and existing under the Laws of the State of New York and a citizen and resident thereof engaged in the importation of cement from the Kingdoms of Denmark and Belgium into the State of Florida and in its said business has contracts with citizens of the state of Florida for the sale of cement imported by it and to be imported (R. 1).

It is the duty of Appellants as and constituting the State Road Department of the State of Florida to enforce the provisions of that certain Act of the Legislature of the State of Florida passed in 1937 and known as Senate Bill No. 760, which is set out in full in Appendix A, and to inspect all cement imported into the State of Florida from any foreign country and sold or offered for sale or to be

used in the State of Florida and to affix thereto evidence showing that the said cement has been so inspected and to collect therefor the inspection fees fixed by said Act (R. 1).

On the 29th day of July, 1937, a mandamus action was brought against Appellants in the Supreme Court of Florida to compel the enforcement of the provisions of said Act (R. 36) and the said Supreme Court on said 29th day of July, 1937, issued and granted its alternative writ of mandamus directed to Appellants (R. 10). Appellants in compliance with and in obedience to said alternative writ of mandamus filed their demurrer or motion to quash said alternative writ of mandamus (R. 15) and thereafter briefs were duly filed by the parties and the cause was orally argued before the Supreme Court of Florida. On the 12th day of October, 1937, the Supreme Court of Florida handed down its decision, judgment and opinion overruling and denying said demurrer or motion to quash filed by said Appellants (R. 17). On November 1, 1937, the Appellee, Broward County Port Authority, by and through its attorneys R. R. Saunders and Dwight L. Rogers filed in the Supreme Court of Florida its petition to intervene in said mandamus proceedings as amicus curiae and also filed petition for rehearing in said cause (R. 30 and 37). With the record in the mandamus case brought against these Appellants in the Supreme Court of Florida standing in this condition the Bill of Complaint in this cause was on November 4, 1937, filed in the District Court of the United States for the Northern District of Florida; and thereafter the three judge Federal Court granted the injunctions as hereinabove set forth.

Prior to the entry of the interlocutory injunction by

said three judge Federal Court on November 27, 1937, Appellants had filed in this cause a certified copy of the pleadings and opinion of the Supreme Court of Florida in said mandamus proceeding showing the pendency and progress of said cause in the Supreme Court of the State of Florida (R. 9) and had also filed an affidavit of A. B. Hale as Chairman of the State Road Department which set forth and stated that he as such Chairman, had caused an investigation to be made for the purpose of determining what the cost would be of conducting and carrying out the inspection of cement manufactured in foreign countries and imported into Florida as provided for in said Act of the 1937 session of the Florida Legislature known as Senate Bill No. 760, which is under attack, and that such investigation showed, and in the opinion of said A. B. Hale, 15 cents per hundred pounds as levied and provided in said Act as the inspection fee would be absolutely necessary to defray all of the expenses incident, essential and necessary to conduct and carry out the inspection as provided in said Act; and that the Act had not been put into operation pending the determination of said mandamus action pending in the Supreme Court of Florida (R. 9).

The Appellees filed, prior to the entry of said interlocutory injunction, a statement of Allen J. Weaver and affidavits of Carl W. J. Grimmelman, F. E. Miller, N. W. Graves and P. H. Bates, the effect of which statement and affidavits was that the cement imported by Appellee Bimco Trading Inc., was of good grade and that the inspection which had theretofore been made of imported cement had cost an infinitesimal amount in comparison to the amount of inspection fees levied in said Act (R. 42-47).

Appellees also filed an affidavit of the Honorable Cordell Hull, Secretary of State of the United States which,

stated briefly, sets forth that a reciprocal trade agreement had been entered into between the United States of America and the Belgo-Luxemburg Economic Union under the authority of the so-called Trade Agreements Act which amended the Tariff Act of 1930 by adding at the end of title 3 thereof, Section 350 (U.S. Code, Title 19, Section 1351; 48 Stat. 943) and that during the year 1936 the only full calendar year during which said Trade Agreement had been in effect, twenty-one per cent of the total imports of cement into the United States were entered in the Florida district and that approximately seventy per cent of the cement imported into Florida is supplied by Belgium; that the Belgium government had protested to the Department of State against the Florida inspection fee provided for under the Act of the Legislature of 1937, under attack in this cause, and that in view of the importance of Florida as a market for imported cement the inspection fee levied by said Act on cement of foreign manufacture is likely to nullify largely the concession granted in said Trade Agreement (R. 47-54).

It is contended by the Appellees in their Bill of Complaint that said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, is unconsitutional and void because it conflicts with:

First. Article I, Section 8 of the Constitution of the United States as this would constitute a direct burden on foreign commerce and would prohibit the importation into the State of Florida of a legitimate article of commerce.

Second. The 14th Amendment to the Constitution of the United States as it denies to plaintiff the equal protection of the law and infringes on the right of contract; and

Third. Article I, Section 10 of the Constitution of the United States as it levies an impost or duty on foreign commerce (R. 4).

Appellants contend that the action of the Federal three judge Court in granting the injunctions hereinabove set out violated Section 265 of the Judicial Code, being Section 379, Title 28 of U.S.C.A., because the mandamus action against these Appellants was pending in the Supreme Court of Florida at the time said injunctions and the final decree were entered in this cause and the effect of said injunctions and final decree entered in this cause is to stay said mandamus proceedings which was then pending and undisposed of in the Supreme Court of Florida.

Appellants further contend that the said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, was enacted under and by virtue of Article I, Section 10, Clause 2 of the Constitution of the United States which specifically reserves in the states the power to levy imposts or duties on imports or exports which may be absolutely necessary for executing its inspection laws and the Constitution itself makes provision that the net produce therefrom shall be for the use of the Treasury of the United States and that such laws shall be subject to the revision and control of the Congress. Any claim of excessiveness of the inspection fees levied by such statute must be passed upon by the Congress and not by the Courts. In addition to this, said Act has never been put into operation and it has never been demonstrated that the fees levied by said statute will produce more than is absolutely necessary to pay the costs of such inspection.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED

FIRST ASSIGNMENT OF ERROR

The Court erred in entering its order granting interlocutory injunction on November 27, 1937.

SECOND ASSIGNMENT OF ERROR

The Court erred in entering its interlocutory injunction on December 3, 1937, wherein it temporarily enjoined the defendants from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 in 1937.

THIRD ASSIGNMENT OF ERROR

The Court erred in entering its order on March 3rd, 1938, overruling defendants' motion to dismiss the bill of Complaint.

FOURTH ASSIGNMENT OF ERROR

The Court erred in entering its final decree on June 14, 1938, wherein it permanently enjoined and forever restrained the defendants from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida known as Senate Bill No. 760 of 1937.

FIFTH ASSIGNMENT OF ERROR

The Court erred in not dismissing the bill of complaint.

SIXTH ASSIGNMENT OF ERROR

The Court erred in granting its interlocutory injunction on December 3, 1937, and failing to make findings of

fact and conclusions of law, which constituted the grounds of its action as required by Federal Equity Rule No. 70½, as amended.

SEVENTH ASSIGNMENT OF ERROR

The Court erred in entering its final decree on June 14, 1938, and failing to make findings of fact and conclusions of law, as required by Federal Equity Rule No. 70½, as amended.

EIGHTH ASSIGNMENT OF ERROR

The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., prohibited the court from granting the injunctive relief as prayed in the bill of complaint.

NINTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that the court was without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., since the granting of an injunction as prayed would have the effect of staying the proceeding then pending in the Supreme Court of Florida against these defendants, involving the validity of the Florida statute under attack in this cause.

TENTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground there was no equity in the bill of complaint.

ELEVENTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that under the allegations of the bill of complaint the State of Florida, acting through its Legislature had the power under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the Statute here under attack.

TWELFTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss the bill of complaint on the ground that, by the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the Statute here under attack.

THIRTEENTH ASSIGNMENT OF ERROR

The Court erred in making and entering final decree herein on June 14, 1938, in favor of the plaintiff and against the defendants.

All assignments of error will be argued under each question as hereinabove set out. The Court is requested to consider the argument under each question as severally applicable to each of the assignments of error.

STATEMENT OF QUESTIONS INVOLVED

FIRST QUESTION

Does not Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., prohibit a United States Dis-

trict Court from granting an injunction against state officers to prevent the enforcement of a state statute after a mandamus proceeding has been instituted and is pending in the Supreme Court of such State to compel such state officers to enforce the identical state statute?

SECOND QUESTION

Does a State have the power under Article I, Section 10, Clause 2, of the Constitution of the United States to enact, through its Legislature, a statute which fixes a minimum standard of an article of commerce when used in such State, and requires the inspection of such articles when imported into such State from a foreign country and lays an inspection fee thereon to pay the expenses of inspecting such imports?

ARGUMENT ON FIRST QUESTION

Section 265 of the Judicial Code, being Section 379 of Title 28 U.S.C.A., provides as follows:

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

We respectfully call to the Court's attention the fact that on the 29th day of July, 1937, petition for mandamus was filed in the Supreme Court of the State of Florida, by State of Florida ex rel. Florida Portland Cement Company, a Corporation, Relator vs. the Appellants here, as and constituting the State Road Department of the State of Florida, respondents, and based on said petition the Supreme Court on the same day issued and granted its alternative

writ of mandamus directed to Appellants requiring Apellants to show cause, if any they could, why peremptory mandamus should not be issued requiring the Appellants to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale or to be used in the State of Florida and affix thereto evidence showing that said cement had been inspected and collect therefor the inspection fees fixed in said Act, being the requirements of said statute of the Legislature of Florida, 1937, known as Senate Bill No. 760; thereafter the Appellants in compliance with and obedience to said alternative writ of mandamus filed a demurrer or motion to quash said alternative write of mandamus; briefs were duly filed and said cause was orally argued before the said Supreme Court of Florida and on the 12th day of October, 1937, the said Supreme Court of Florida handed down its decision, judgment and opinion overruling and denying said demurrer or motion to quash filed by Appellants and in said opinion the Supreme Court of Florida sustained said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, and held that it was a legal and valid law of the State of Florida; and allowed Appellants ten days within which to file an answer or return in said cause. Appellants filed no answer or return in said cause but filed a petition for rehearing and subsequently filed a praecipe for withdrawal of said petition for rehearing. All of which was pending before the Supreme Court of Florida and undisposed of on the 8th day of November, 1937.

On November 1, 1937, R. R. Saunders and Dwight L. Rogers, members of the bar of the Supreme Court of Florida on behalf of and at the instance and request of the Appellee, Broward County Port Authority, a public corporation, filed petition in said Supreme Court of Florida to

intervene in said mandamus proceedings as Amicus Curiae and also filed petition for rehearing in said cause. All of which was pending before the Supreme Court of Florida on the 8th day of November, 1937, as is shown by the certified copy of the pleadings and opinion of the Supreme Court of Florida (R. 9-37) and especially the certificate of G. T. Whitfield, Clerk of the Supreme Court of Florida (R. 36 and 37).

The Bill of Complaint was filed in the United States District Court in and for the Northern District of Florida on November 4th, 1937, more than three months after the institution of the said mandamus proceedings in the Supreme Court of the State of Florida and before a peremptory writ of mandamus had been issued.

Prior to the filing of the Bill of Complaint in the Northern District of Florida in this cause, the Appellants were defendants in the mandamus action which had been instituted in the Supreme Court of the State of Florida to compel these Appellants to enforce the provisions of said Senate Bill No. 760 and upon the filing of said Bill of Complaint in the United States District Court of the Northern District of Florida on November 4th, 1937, these Appellants were made defendants in an injunction action seeking to prevent these Appellants from enforcing the provisions of said Senate Bill No. 760. In other words upon the bringing of this action in the Federal Court these Appellants became the defendants in two causes, one a mandamus proceeding in the State Court which was and had been pending for sometime prior to November 4, 1937, to compel these Appellants to enforce the provisions of said Act and the other an injunction proceeding in the United States District Court of the Northern District of Florida

to prevent these Appellants from enforcing the provisions of the identical Act.

Section 265 of the Judicial Code (Title 28, Section 379, U.S.C.A.) was enacted for the very purpose of preventing a conflict of jurisdiction between the State and Federal Courts such as was actually created in this case, and the United States District Court in and for the Northern District of Florida was without jurisdiction to grant the injunctive relief against Appellants with this situation existing.

Certainly it can not be contended that the mandamus action in the Supreme Court of the State of Florida is not a proceeding in a court of a state; and no contention can be made that any fact exists which can bring the said mandamus action within the exception contained in said Section 265 of the Judicial Code.

This question has been before the Courts many times and it has been consistently held that the purpose of Section 265 of the Judicial Code is to preserve the dignity and protect the effectiveness of the process of Courts and to avoid unseemly conflicts between them.

American Association, Limited vs. Hurst et al, 59 Fed 1.

Thomas J. Haines et al vs. Charles Carpenter et al, 91 U.S. 254; 23 L.Ed. 345.

Dial et al vs. Reynolds et al, 96 U.S. 340, 24 L.Ed. 644.

United States vs. Parkhurts-Davis Mercantile Co., 176 U.S. 317, 44 L.Ed. 485.

Peck et al vs. Jeness, Gage and Lyons, etc, 7 How. 612, 12 L.Ed. 841.

Essanay Mfg. Co. vs. Kane 258 U. S. 358, 66 L.Ed. 658.

Hill vs. Martin 296 U.S. 393, 80 L.Ed. 293.

Richmond Hosiery Mills vs. Camp, 74 Fed. (2nd) 200.

Harrison et al vs. Triplex Gold Mines et al, 33 Fed. (2nd) 667.

Ritholz et al vs. North Carolina State Board, etc. et al, 18 F. Supp. 409.

Reisler vs. Forsyth et al, 21 F. Supp. 610.

Pughe vs. Patton et al, 21 F. Supp. 182.

While the record in this case fails to show that a peremptory writ of mandamus has been issued by the Supreme Court of Florida against these Appellants, such issuance could in no way affect the prohibition created by Section 265 of the Judicial Code.

As was stated in the case of *Hill vs. Martin*, 296 U.S. 393, 80 L.Ed. 293, the prohibition of Section 265 continues from the institution of the proceedings in the State Court until the final satisfaction of the final judgment or decree rendered in that Court. Mr. Justice Brandeis in discussing this point used the following language (text 403):

> "The prohibition of Section 265 is against a stay of 'proceedings in any Court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of the final process. It applies to Appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the Court and by its ministerial officers; applies not only to an execution issued on a judgment, but

to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

In the case of *Reisler vs. Forsyth et al,* 21 F. Supp., 610 (Cited supra) the facts were very similar to those in the case at bar. A mandamus had been issued by the New Jersey Supreme Court when application was made to the Federal Court for an injunction, just as in the case at bar, and the Court in denying the application for injunction and holding that because of Section 265 of the Judicial Code it was without jurisdiction, used the following language (text 612):

> "By virtue of the authorities cited it seems clear that this Court under the facts in this case cannot order one not to do that which a State Court has ordered him to do. Aside from the statute hereinbefore quoted, the rule is based upon comity and is essential to the orderly administration of justice, and to prevent unseemly conflict between courts."

A mandamus proceeding in a State Court continues to pend in said Court until it is reversed or set aside by a direct proceeding in that cause.

In the case of *Pughe vs. Patton et al,* 21 F. Supp. 182 (Cited supra) the following language was used (text 185):

> "A bill in a state court that has ripened into a final decree, and permanent injunction, may never be said to have come to rest, in the sense that it may be reviewed in a Federal Court. It is a live proceeding out of which the arm of the chancellor may reach at any time. See, also, *Harrison vs. Triplex Gold Mines* (C.C.A.) 33 Fed. (2nd) 667."

A peremptory writ of mandamus may never be said to have come to rest because the arm of the Court may reach out at any time to enforce compliance with the commands of the writ.

Appellants earnestly contend that the United States District Court in and for the Northern District of Florida, was without jurisdiction to grant the injunctive relief prayed in the Bill of Complaint and this cause should be reversed.

ARGUMENT ON SECOND QUESTION

For convenience of the Court we repeat the second question:

Does a State have the power under Article 1, Section 10, Clause 2, of the Constitution of the United States to enact, through its Legislature, a statute which fixes a minimum standard of an article of commerce when used in such state, and requires the inspection of such article when imported into such State from a foreign country and lays an inspection fee thereon to pay the expenses of inspecting such imports?

Article I, Section 10, Clause 2, of the Constitution of the United States provides as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

By this provision the power to levy imposts or duties on imports or exports that may be absolutely necessary for executing inspection laws is specifically reserved in the States, and if the statute under consideration lays the inspection fees on imports for the purpose of paying the expenses of inspecting the imported article, it is clear that the Legislature of Florida acted within its reserved powers under the Constitution of the United States.

By reference to the statute, which is set out in full in Appendix A hereto, it will be readily seen that it fixes the minimum standard for all cement offered for sale, or sold, or used in the State of Florida, and makes it the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold, or offered for sale, or to be used in the State of Florida, for the purpose of ascertaining if such cement complies with the minimum standard so fixed, and requires the payment to said State Road Department of an inspection fee of 15 cents on each one hundred pounds so inspected, and provides that only the monies derived and collected from such inspection fees shall be used in enforcing said statute, and by Section 7 the Act is declared to be for the purpose of securing the public safety of the people of the State of Florida.

It therefore clearly appears that said statute is an inspection law to protect the public safety and that the fees are levied for the specific purpose of paying the expenses of executing such inspection law.

The Supreme Court of the State of Florida in the case of *State of Florida ex rel. Florida Portland Cement Company, vs. Hale et al,* 129 Fla. 588, 176 Southern, 577 (R. 18-30) in passing upon this point said (text 581):

"It will be observed that this provision of the Constitution reserves in the States the right to lay imposts or duties on the imports or exports which may be absolutely necessary for executing its inspection laws. But in reserving that power in the states, it was provided in this section of the Constitution that the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of Congress. Therefore, if the amount levied in this act to cover the expense of inspection should exceed the costs of such inspection, the net surplus must be accounted for to the Treasury of the United States.

"It will be observed that this power reserved in the states applies only to inspection fees laid on imports and exports. It is well settled that the provisions of Clause 2, Section 10, article 1, of the Constitution of the United States applies only to articles imported from, or exported to, foreign countries. See *New Mexico ex rel. McLean vs. Denver & R.G.R. Co.*, 203 U.S. 38, 27 S.Ct. 1, 3, 51 L.Ed. 78; *Patapsco Guano Co. vs. Board of Agriculture*, 171 U.S. 345, 18 S. Ct. 862, 864, 43 L.Ed. 191; *Woodruff vs. Parham*, 8 Wall, (75 U.S.) 123, 19 L.Ed. 382; *Pittsburg & S. Coal Co. vs. Louisiana*, 156 U.S. 590, 15 S.Ct. 459, 39 L.Ed. 544." (R. 22-23) * * *

(text 583):

"In the light of the decisions, the provisions of the Constitution, and the provisions of the act under consideration, *we hold that it constitutes a valid inspection law; that the purpose of the act is for the safety and welfare of the consumer of commercial cement in the State of Florida.*"

(text 584):

"The inspection of cement imported from foreign countries was deemed by the Legislature to be necessary as a protection to dealers in Florida against

having foisted on them a commodity which can not be resold under the laws of Florida, and which, because of its inferior quality, constitutes unfair competition in this commodity." (R. 26-27).

If the inspection fees levied under the Act produce more than is necessary to pay the expenses of inspection, the net produce therefrom must be accounted for and paid over to the Treasury of the United States as provided in the Constitution; and the statute is subject to the revision and control of Congress. Therefore the Courts are not concerned with any claim of excessiveness of the inspection fee because the State can only retain out of the monies collected thereunder, sufficient to pay the actual expenses of inspection and should there be any monies left after the payment of such expenses, the State Road Department of Florida is required to pay over such balance to the Treasury of the United States. Now, the statute under consideration has never been put into operation, therefore it has never been demonstrated that the inspection fees levied therein will produce more than what is absolutely necssary to pay the costs of executing its inspection provisions. However, if, after it is put into force, it should develop that the fees laid did produce more than was absolutely necessary to cover the costs of the inspection, the State Road Department of Florida would pay over to the Treasury of the United States, all such net produce until such time as either the Legislature of the State of Florida or the Congress of the United States under the specific authority delegated by said clause of the Constitution, reduced such inspection fees. In other words the Constitution recognizes that the State might levy an inspection fee which would produce more than was absolutely necessary to pay the expenses of executing its inspection laws by providing that all net produce should be accounted for to the Treas-

ury of the United States; and by providing that such Act should be subject to be revised and controlled by Congress, specified the authority to pass upon any claim of excessiveness. When the Constitution prescribes the manner in which a thing shall be done, it prohibits the doing of such thing in a different manner from the one prescribed in the Constitution.

This provision of the Constitution and a statute similar to the one under consideration here were before the Court in the early case of *Neilson vs. Garza,* 17 Fed. case, page 1302, case No. 10,091 (2 Woods 287):

> "As the article of the constitution which prescribes the limit goes on to provide that 'all such laws shall be subject to the revision and control of congress,' it seems to me congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it." * * * *
>
> "I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas. The fee or duty exacted may be excessive; but if so, congress can regulate that. Our only concern with the case is to know whether the acts required by the state law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character;

and that the acts of the defendant for which the fees exacted by him were charged were fairly performed under said inspection law; and that the fees are valid charges, until they shall be altered by congress."

In the case of *Padelford, Fay and Co. vs. Mayor et al,* 14 Ga. Rep. text 516, the Court used the following language in passing upon this identical question:

> "If the purpose be to execute its inspection laws, the State may tax imports without the consent of Congress. And she may make the tax as high as she pleases; but she can retain of the 'produce' of the tax, only as much as is necessary to defray the expenses of the execution of the inspection laws. The residue she must pay to the United States. No part of the law, under which she imposes a tax for this purpose, is void. It is only subject to revision and control by Congress."

In the case *Patapsco vs. North Carolina,* 171 U.S. 345, 34 L.Ed. 193, the question under consideration in the case at bar was considered and the decision in the case of *Neilson vs. Garza,* 17 Fed. cases 1302, case No. 10,091 (2 Woods 287) cited supra, was cited and approved by this Court. Mr. Chief Justice Fuller in delivering the opinion of the Court, used the following language:

> "The clause recognized that the inspection of such article may be required by the States, and that they may lay duties on them to pay the expense of such inspection; but as it would be difficult, if not impossible, to determine the necessary amount with exactness, and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of Congress, it has been

suggested that whether inspection charges are excessive or not might be for Congress to determine and not the courts." * * * *

"If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." * * * *

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing, protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a State.

Clause two of section ten expressly allows the State to collect from imports as well as exports the amount necessary for executing its inspection laws." * * * *

"It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution."

This provision of the Constitution and the power of a state to enact inspection laws and levy inspection fees thereunder, was again passed upon in the case of *McLean vs. Denver etc.*, 203 U.S. 38, 51 L.Ed. 85, and Mr. Justice Day in sustaining the state statute said (Text 49):

> "As to the objection predicated on Section ten of Article one, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. *Patapso Guano Co. vs. North Carolina Board of Agriculture,* 171 U.S. 345, 350, and cases cited. Moreover, that paragraph of the Constitution expressly reserves the right of the States to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution."

In the case of *Red "C" Oil Co. vs. North Carolina,* 222 U. S. 380, 56 L.Ed. 240, this Court carefully considered the question now before the Court and sustained an Act of North Carolina very similar to the Act now under consideration. The Court speaking through Mr. Chief Justice White (Text 393) said:

> "The contention that the tax is so excessive on its face as to conclusively evidence the unconstitutionality of the burden, if imposed as a mere inspection charge, is, we think, also without merit. Prima facie the charge must be deemed to be reasonable. *Western Union Telegraph Co. vs. New Hope,* 187 U.S. 419."

(Text 394):

> "A law cannot be declared invalid because in the opinion of the court it does not accord with sound policy. The appeal for redress in su h case must be to the law-making power."

The proposition now being considered by the Court is to be differentiated from that considered in *Voight vs. Wright,* 141 U.S. 62, and *Brimmer vs. Rebman,* 138 U.S. 78, and other cases of similar holding because they all deal with State statutes which discriminate against products of

other States. No such question is involved in the case at bar.

Mr. Chief Justice Marshall made the distinction between these questions clear in the case of *Brown vs. Maryland*, 12 Wheat. (25 U.S.) 419, 6 L.Ed. 678, and in striking down the Maryland statute involved therein calls attention to the provision of the Constitution of the United States now being considered and points out that a state may levy a tax or duty of inspection on imports or exports under this provision.

We respectfully submit that the Legislature of the State of Florida acted clearly within its power reserved under Article 1, Section 10, Clause 2, when it enacted Senate Bill No. 760 of 1937, and that said statute is a valid, binding inspection law as was held by the Supreme Court of Florida in the decision hereinabove cited, and the final decree of the United States District Court of the Northern District of Florida should be reversed.

While no mention is made in the Bill of Complaint as to any effect which said Senate Bill No. 760, laws of Florida of 1937, might have on any so-called Trade Agreement negotiated by the Secretary of State of the United States under authority delegated to the President of the United States by the so-called Trade Agreements Act, being an amendment to the Tariff Act of 1930, and designated under U.S.C.A., Title 19, as Sections 1351 and 1352 (48 Stat. 943 and 944), in view of the fact that an affidavit was filed herein by the Honorable Cordell Hull, Secretary of State of the United States, wherein it is stated that a protest has been received from the government of Belgium and that said Florida statute might materially affect the

Trade Agreement which had been negotiated between the United States and the Belgo-Luxemburg Economic Union, we desire to call the Court's attention to the fact that these Trade Agreements can in now way affect the validity of statutes enacted by States under power which is specifically reserved by the Constitution of the United States to the States.

Of course we recognize that by the Constitution of the United States, Treaties are made the Supreme Law of the Land. However, in order to be the Supreme Law of the Land a Treaty must be constitutional. An unconstitutional Treaty would not be a Supreme Law of the Land. The Constitution of the United States by Article 2, Section 2, Clause 2, provides the manner by which the President of the United States may negotiate and enter into Treaties. The provision in this regard being as follows:

> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

Under this provision the President has the power to negotiate Treaties and after he has negotiated same, such Treaty must be submitted to the Senate and be concurred in by a vote of two thirds of the Senators present. In no other way can a Treaty become the Supreme Law of the Land. And we further submit that a Treaty, even though made strictly in accordance with the constitutional provisions in reference to such making, must be in accord with the other provisions of the Constitution in order to be constitutional and valid. In other words, the Constitution of the United States cannot be changed by a Treaty and neither can a power specifically reserved under the Constitution of the United States to the States be taken

away from the States by a Treaty. Therefore, we respectfully submit that, even a Treaty made by the President and concurred in by the Senate as provided by the Constitution of the United States, could in no way affect the power specifically reserved in the States by Article 1, Section 10, Clause 2, of the Constitution of the United States nor the validity of a State statute enacted under such reserved power. And especially is this true in view of the provision made by the Constitution of the United States that the State statute is subject to be revised and controlled by Congress. In order to revise or control this State statute by any authority except the Legislature of the State it would be necessary for both branches of the Congress to take action thereon.

What we have just said applies to Treaties negotiated and made in accordance with the provisions of the Constitution. It is not suggested here that Senate Bill No. 760, Laws of Florida of 1937, might affect any Treaty existing between the United States and any foreign country but only that it *might* affect the Trade Agreement entered into between the United States and the Belgo-Luxemburg Economic Union. These Trade Agreements have none of the distinguishing features of a Treaty. Therefore the validity of this State statute certainly can in no way be affected by any such Agreement.

CONCLUSION

We respectfully submit that the United States District Court in and for the Northern District of Florida was without jurisdiction to grant injunctive relief against Appellants because of the prohibition contained in Section 265 of the Judicial Code, being Section 379 of Title 28 U.S.C.A.; and that said Senate Bill No. 760, Laws of Flor-

ida of 1937, was enacted by the Legislature of the State of Florida under the power specifically reserved in the States by Article 1, Section 10, Clause 2, of the Constitution of the United States and is constitutional and valid in every respect.

All of which is respectfully submitted.

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APPENDIX "A"

SENATE BILL NO. 760

AN ACT Providing for the Fixing of a Minimum Standard for all Cement Offered for Sale, Sold or Used in the State of Florida and to Authorize and Empower the State Road Department of the State of Florida to Write Rules and Regulations for the Effectual Enforcement of this Act; Providing for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Providing for an Inspection Fee to be Paid for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Offered for Sale, Sold, or to be Used in the State of Florida; Providing Penalties for the Violation of any of the Provisions of this Act as well as any Rule or Regulation Promulgated by the State Road Department; and Providing for the Enforcement of the Provisions of and Regulations made in Pursuance of this Act.

"WHEREAS, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida, and,

"WHEREAS, in view of the fact that large numbers of dwellings, apartment houses, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

"WHEREAS, it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

"WHEREAS, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

"WHEREAS, the importation and sale or use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

"THEREFORE:"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida; said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in the construction of public highways which said standard of cement was set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed and designated as a minimum for all cement offered for sale or sold or used in the State of Florida and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

SECTION 2. It is hereby made the duty of the State Road Department to inspect all cement imported or

brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm, association of persons, or corporation to sell, offer for sale or use in the State of Florida any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15c) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

SECTION 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this Act. The State Road Department shall use and expend in enforcing this Act only

monies derived and collected hereunder.

SECTION 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

SECTION 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this Act, or by any rule or regulation adopted as provided hereunder.

SECTION 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00, or imprisonment in the county jail for not more than 12 months, or both in the discretion of the court.

SECTION 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

SECTION 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted offi-

cials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to comply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

SECTION 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney, and of the Attorney General, to assist in the enforcement of the provisions of this Act upon the request of the State Road Department.

SECTION 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SECTION 11. This Act shall take effect upon its becoming a law.